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UNITED STATES TAX COURT
WASHINGTON, DC 20217

CHARLES L. GARAVAGLIA,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	Docket No. 2500-07.
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	
	)	

O R D E R

On July 11, 2014, petitioner filed a motion for leave to file out of time a motion to vacate the decision, with a motion to vacate lodged in this case, pursuant to the determination of the Court as set forth in its Memorandum Findings of Fact and Opinion, Garavaglia v. Commissioner, T.C. Memo. 2011-228, 102 T.C.M. (CCH) 286 (2011), aff'd, 521 Fed. Appx. 476 (6th Cir. 2013). Petitioner's motion for leave was granted, and the motion to vacate was filed on July 21, 2014. Petitioner's motion to vacate alleges that respondent had perpetrated fraud on the court by claiming that petitioner's documents, which petitioner alleges he needed to prosecute his case at trial, had been destroyed by respondent. On September 4, 2014, respondent filed a response to petitioner's motion to vacate decision challenging this Court's jurisdiction to vacate the decision. Respondent's Response to Motion to Vacate Decision, filed September 4, 2014. On September 8, 2014, the parties participated in a conference call with the Court. Pursuant to the conference call, and by order dated September 8, 2014, the Court ordered the parties to file briefs addressing whether, in the Sixth Circuit Court of Appeals, this Court has jurisdiction to vacate a final decision where fraud on the court has been established. Petitioner filed his brief on September 12, 2014; respondent filed his brief on September 17, 2014. The Court took the above-mentioned matter under advisement.

SERVED Sep 29 2014

Background

In the late 1980s, petitioner and George Rogers were business associates. Petitioner and Mr. Rogers jointly owned at least two employee leasing companies, among them Trans Continental Leasing, Inc. (Trans Continental), which eventually became Trans International Services, Inc. (Trans International), and which was owned in equal parts by petitioner and Mr. Rogers.[1] Garavaglia v. Commissioner, 102 T.C.M. (CCH) 266, 288-289. Petitioner also owned 100 % of C & G Consultants, Inc. (C & G), an S corporation that received payments from the employee leasing companies with which petitioner was involved ostensibly for consulting services. Id. at 287-288.[2] As a result of petitioner and Mr. Rogers' business activities, which involved hiring employees, leasing these employees to other companies, and managing the payroll accounts and workers' compensation insurance policies on behalf of these companies, petitioner and Mr. Rogers became the subjects of a criminal investigation. Id. at 293.

The investigation concerned whether petitioner, Mr. Rogers, and several other individuals participated in a scheme to defraud insurance companies by providing false payroll information to the companies and thereby underpaying insurance coverage, while retaining the insurance payments forwarded to them by their clients and distributing these payments to C & G and other entities controlled by petitioner, Mr. Rogers, and/or their associates. Id. at 289-290, 293-294. The investigation also concerned whether petitioner, Mr. Rogers, and others conspired to defraud the U. S. Government by claiming false insurance premium deductions on corporate income tax returns relating to their leasing company entities, including Trans Continental and Trans International. Id. at 293.

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[1]The record shows that petitioner and Mr. Rogers attempted to file an election to have Trans International taxed as an S corporation for the years at issue. Garavaglia v. Commissioner, T.C. Memo. 2011-228, 102 T.C.M. (CCH) 286, 296 (2011). This election was defective. Id.

[2]Petitioner was also involved with another entity, Branch International Services, Inc. (Branch International), which was the subject of the same investigation. Id. at 291.

In 1992 search warrants were executed at various business locations occupied by petitioner and Mr. Rogers, including Mr. Rogers' business location in Milford, Michigan. Id. More than 100 boxes of documents were seized in total, including documents relating to Trans Continental and Trans International. Id. Respondent subsequently returned at least 28 of these boxes to petitioner at some point on or before July 14, 2008; petitioner had these boxes destroyed. Id. at 293 n.8.

In 2001 after both petitioner and Mr. Rogers reached plea agreements in their respective criminal cases and Mr. Rogers' civil case was concluded, Special Agent Joseph Ellery (now retired) contacted Mr. Rogers regarding Trans International records seized from him that were still in storage. Transcript of Record Vol 5 at 581, Garavaglia v. Commissioner, T.C. Memo. 2011-228. These records may have included canceled checks relating to Trans International's business dealings. Id. Mr. Ellery contacted Mr. Rogers to inquire whether Mr. Rogers wanted the Trans International documents returned to him. Garavaglia v. Commissioner,102 T.C.M. (CCH) at 294. Mr. Rogers told Mr. Ellery to destroy these documents. Id. Today it is unclear from the record what types of documents Mr. Ellery had received permission to destroy and whether these documents included canceled checks. It is also unclear from the record what became of these documents thereafter and how many of them, if any, were actually destroyed.

Respondent represents that in 2003 the IRS Criminal Investigative Division (CID) relocated from its previous home in the McNamara Building to the Enterprise Computing Center (ECC) in Detroit, Michigan. Response to Motion to Vacate, at 5, para. 18, filed September 14, 2014. This move resulted in the movement of various physical evidence and documents to the new ECC location. Id. It is unclear from the record whether or how this relocation affected the documents at issue in this case.

Respondent represents that in 2005, as part of a civil investigation of petitioner, Revenue Agent Suzanne Carene, in conjunction with the then-Small Business/Self Employed (SB/SE) Senior Counsel, requested documents pertaining to petitioner's case from the CID. Id. at 6-10. Ms. Carene was initially denied access to some documents used at petitioner's grand jury proceeding for the criminal charges. Id. It is unclear how many of the grand jury documents Ms. Carene was eventually given access to.

Some documents were produced to Ms. Carene and moved back to the McNamera Building. Id. These documents were made available to petitioner and his attorney, and the agents then involved in the investigation indicated that no further documents had been retained by respondent. Id. On the basis of the documents then available, respondent assessed a deficiency against petitioner and issued a notice of deficiency. Petitioner subsequently filed a petition to this Court challenging respondent's determination.

The case was calendared for trial at a Special Session of the Court commencing on August 23, 2010, to August 27, 2010, in Detroit, Michigan. The parties called 13 witnesses. At trial, petitioner alleged that the payments made by Trans International to C & G were nontaxable loan repayments rather than income omitted by petitioner. Garavaglia v. Commissioner, 102 T.C.M. (CCH) at 298. We did not find this allegation to be credible at trial. Id. at 301. A significant portion of the trial centered around the testimony of respondent's revenue agents pertaining to the contents and whereabouts of the records obtained from Mr. Rogers' Milford, Michigan, business location.

Leading up to the trial, petitioner filed a motion to dismiss on May 12, 2010, alleging that "Respondent failed to preserve the seized documents and bank records, even though he knew that the documents and bank records would be material to Petitioner's case" and that this "failure to preserve the evidence was either intentionally or because of gross negligence on his part." Motion To Dismiss Second Amended Answer Or Alternatively, To Restrict Respondent From Opposing Certain of Petitioners' Claims at 4, paras. 6-7, filed May 12, 2010, Garavaglia v. Commissioner, T.C. Memo. 2011-228. Petitioner further contended that the unavailable documents contained "[v]irtually all of the records of Transinternational [sic] Services, Inc., including checks, check registers, bank statements, general ledgers, and other documentation" in addition to similar records relating to C & G, petitioner's personal records, and records of petitioner's other entities. Id. at 3, para. 5. According to petitioner's brief in support of motion to dismiss second amended answer, filed May 12, 2010, "[t]he lack of records certainly impacts the ability of Petitioners to receive a fair trial * * * because Petitioners do not have the ability to use financial records in their cross-examination." Petitioner's Brief in Support of Motion To Dismiss Second

Amended Answer Or Alternatively, To Restrict Respondent from Opposing Certain of Petitioners' Claims at 5, filed May 12, 2010, Garavaglia v. Commissioner, T.C. Memo. 2011-228.[3] Petitioner also argued:

> The facts are clear that Respondent does not have good and proper log records regarding how he retained the documents and what happened to the documents after he was through with them. * * * Additionally, it was foreseeable to Respondent that Petitioners would need their records to substantiate expenses, prove loans, prove the nature of payments received by them, prove they did not receive payments and prove they repaid funds when transactions were voided. The Respondent should not now be able to put Petitioners to the task of proving complicated financial transactions without having the financial records upon which to base their proofs .

Id. These missing records were allegedly among the documents seized from Mr. Rogers.

At trial, petitioner continued to allege that respondent had been in possession of documents relevant to the disputed transactions but had not provided them to petitioner. Petitioner's then-counsel, Joseph Falcone, stated that "the * * * [respondent] did get * * * [documents relating to the relevant] insurance policies, which are now lost." Transcript of Proceedings at 1114, Garavaglia v. Commissioner, T.C. Memo. 2011-228. Respondent's then-trial counsel, an SB/SE Senior Counsel, indicated that the record was incomplete with respect to the disputed transactions, stating that "in some instances we have checks. In some instances we don't have checks." Id. at 40. At trial, testimony by Ms. Carene further indicated that there was a discrepancy between the volume of the documents seized and the volume of documents available to the parties for trial, even considering petitioner's destruction of the documents returned prior to 2008. Ms. Carene testified "I don't know what happened to any seized records" and of

[3]Petitioner's wife, Mary Ann Garavaglia, was also a party to these proceedings from the onset.

the records in her possession "[t]here were not boxes. It was a file drawer", though she did recall looking at boxes at some later point during the audit. Id. at 1234.

When questioned about the records seized from Mr. Rogers, Mr. Ellery, who had been a part of the original criminal investigation of petitioner and Mr. Rogers, testified that it was respondent's policy to return seized records solely to, or destroy seized records with solely the permission of, the individual from whom they were seized. Id. at 1451. Mr. Ellery further testified that the records in question were destroyed at some point and that the audit of petitioner had concluded prior to the documents' destruction. Id. at 1456. However, Mr. Ellery stated that he was "not sure when they were actually destroyed * * * [b]ut I take it they were destroyed." Id. at 1448. Special Agent James Budde (now retired), another CID agent involved with the 1992 criminal investigation, stated that he was "quite certain Trans International documents were in the possession of George Rogers * * *." Transcript of Proceeding at 1201, Garavaglia v. Commissioner, T.C. Memo. 2011-228. In his March 3, 2011, brief to the Court, respondent denied petitioner's contentions that respondent had anything to do with a lack of evidence pertaining to the alleged Trans International-C & G transactions:

> Objection to the claim that "Respondent's agents destroyed the banking records of Trans International," as unsupported by the evidence. Objection to the claim that records ever existed that "would have clearly resolved the issues of whether the two $75,000 alleged loans were made," as unsupported by the evidence.

Reply Brief for Respondent at 165, filed March 3, 2011, Garavaglia v. Commissioner, T.C. Memo. 2011-228. Respondent further claimed that "[t]here is no reason to think that records ever existed that would have exonerated petitioner", Id. at 348, and

> but what he dreams is missing never existed in the first place. What are the specific missing documents? Cancelled checks and bank records showing his fictitious loans to Trans and Branch? Those never existed. You cannot go missing if you never existed. There is no missing evidence that would have helped Garavaglia. Id. at 352.

On September 26, 2011, the Court issued its Memorandum Findings of Fact and Opinion, Garavaglia v. Commissioner, T.C. Memo. 2011-228, in this case. On January 12, 2012, a decision was entered for respondent. Following the decision, petitioner filed a notice of appeal with the Court of Appeals for the Sixth Circuit. The Court of Appeals affirmed this Court's judgment on April 11, 2013, Garavaglia v. Commissioner, 521 Fed. Appx. 476 (6th Cir. 2013), and denied petitioner's request for a rehearing en banc on June 11, 2013. Petitioner did not file a writ of certiorari in the U. S. Supreme Court within the allotted 90 days. The judgment of this Court therefore became final on September 9, 2013. I.R.C. sec. 7481(a)(2)(A); Sup. Ct. R. 13.

In May 2014 respondent disclosed that during a reorganization of a CID evidence storage room in the ECC, Special Agent Joseph Boley discovered several, highly disorganized, boxes of documents with petitioner's name written on them. Respondent's Response to Motion to Vacate at 11, filed September 12, 2014. Mr. Boley also discovered several unlabeled boxes that he believed contained documents pertaining to petitioner. Id. at 12, para. 41. According to respondent, Mr. Boley "also stated that the boxes were not located next to each other or in any logical order." Id. para 42. Thereafter, in June 2014, Mr. Comeau, SB/SE Senior Counsel, notified petitioner of the discovery of these boxes. Id. at 13, para. 45. At least some of these newly located materials have since been made available to petitioner. It is unclear from the record just how many boxes of documents were discovered or just how many documents were returned. During a conference call with the Court on July 21, 2014, respondent indicated that there may be approximately 30 boxes of documents that may be relevant to the matter. During that same conference call, Mr. Comeau informed the Court that he would no longer be respondent's counsel for this case as he anticipated potentially being called as a witness in future proceedings. As of his last status report, respondent states that as of August 19, 2014, he had provided petitioner with copies of five

boxes of documents, containing at least 17,384 individual pages. Respondent's Status Report, at 4, filed September 4, 2014, Garavaglia v. Commissioner, T.C. Memo. 2011-228. Some of these documents consisted of copies of "checks which were not [previously] in evidence." Id. at 5. It is not clear from the record whether these checks relate to any Trans International transactions.[4]

The instant matter before this Court is a motion to vacate this Court's decision for fraud on the court.

Discussion

I. Jurisdiction

Established under Article I of the Constitution, "[t]he Tax Court is a court of limited jurisdiction and lacks general equitable powers." Commissioner v. McCoy, 484 U.S. 3, 7 (1987) (per curiam) (internal citations omitted). "Its powers must [therefore] be limited to what has been given to it by specific Act of Congress and by its own rules adopted pursuant to Congressional authority." Louisville Builders Supply Co. v. Commissioner, 294 F.2d 333, 339 (6th Cir. 1961). Because "[t]here is no statute that allows the Tax Court to reopen a final decision[,] * * * once a decision of the Tax Court becomes final, the Tax Court no longer has jurisdiction to consider a motion to vacate its decision." Harbold v. Commissioner, 51 F.3d 618, 621 (6th Cir. 1995).

However, the Third, Sixth, Seventh, Ninth, and D.C. Circuits recognize a fraud on the court exception to the general rule set out in Harbold. Seven W. Enterprises, Inc., 723 F.3d 857, 862 (7th Cir. 2013);; Drobny v. Commissioner, 113 F.3d 670 (7th Cir. 1997); Billingsley v. Commissioner, 868 F.2d 1081, 1085 (9th Cir. 1989) ("a decision obtained by fraud on the Tax Court is 'not a decision at all' and could therefore be set aside at any time."); Backstrom v. Commissioner, 168 F.3d 489 (6th Cir. 1998) (unpublished decision); Harbold v. Commissioner, 51 F.3d at 621-623 (6th Cir. 1995); True v. Commissioner, 999 F.2d 540 (6th Cir.

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[4]At least some of these checks do relate to petitioner's other entity, Branch International. Respondent's Status Report, at 5, filed September 4, 2014, Garavaglia v. Commissioner, T.C. Memo. 2011-228.

1993) (unpublished decision); Abatti v. Commissioner, 859 F.2d 115 (9th Cir. 1988); Pasternack v. Commissioner, 478 F.2d 588 (D.C. Cir. 1973); Stickler v. Commissioner, 464 F.2d 368 (3d Cir. 1972); Flood v. Commissioner, 468 F.2d 904 (9th Cir. 1972); Toscano v. Commissioner, 441 F.2d 930 (9th Cir. 1971); see also Klein v. United States, 86 F. Supp. 2d 690 (E.D. Mich. 1999).[5]

Respondent argues that this exception, originally established in Reo Motors, Inc. v. Commissioner, 219 F.2d 610 (6th Cir. 1955),[6] has been overruled by Lasky v. Commissioner, 352 U.S. 1027 (1957) (per curiam), aff'g 235 F.2d 97 (9th Cir. 1956) and is no longer recognized by the Sixth Circuit. Furthermore, respondent argues that Harbold itself precludes this Court from vacating a decision on the basis of fraud on the court. Respondent's contention that the Tax Court lacks jurisdiction on these grounds is misplaced.

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[5]The Second and Eleventh Circuits have reserved ruling on this issue. All Cmty. Walk In Clinic v. Commissioner, 223 Fed. Appx. 949 (11th Cir. 2007) (per curiam); Cinema '84 v. Commissioner, 412 F.3d 366 (2d Cir. 2005). However, there is some case law to suggest that the exception exists in those circuits. See Davenport Recycling Associates v. Commissioner, 220 F.3d 1255 (11th Cir., 2000); Senate Realty Corp. v. Commissioner, 511 F.2d 929 (2d Cir. 1975). The Eighth Circuit does not recognize the fraud on the court exception. Jefferson Loan Co., Inc. v. Commissioner, 249 F.2d 364 (8th Cir. 1957). There is no settled law in the other circuits.

[6]The U. S. Supreme Court first recognized the ability of a Federal court to vacate its prior decisions if they were obtained by fraud on the court in Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (1944). Following the Hazel-Atlas decision, Rule 60 of the Federal Rules of Civil Procedure was amended to explicitly reference the ability of Federal courts to vacate judgments for fraud on the court. See Fed. R. Civ. P. 60. Rule 60, however, fails to establish the elements defining fraud on the court, providing, in its current form, only that "This rule does not limit a court's power to: * * * set aside a judgment for fraud on the court." Id. 60(d). The Federal circuits have been left to establish their own elements for fraud on the Court. Compare Kenner v. Commissioner, 387 F.2d 689, 691 (7th Cir. 1968) with Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993).

Although Lasky does indeed overrule Reo Motors, it addresses Reo Motors' much broader holding that: "the Tax Court has power in its discretion, in extraordinary circumstances, to correct a decision after it has become final * * *". Reo Motors, 219 F.2d at 612. It is not the specific exercise of equitable power to vacate a judgment obtained through fraud on the court that Lasky prohibits, but rather Reo Motors' overbroad treatment of the Tax Court "as having the inherent power of a United States [Article 3] Court." Lasky v. Commissioner, 235 F.2d 97, 99 (9th Cir. 1956), aff'd, 352 U.S. 1027 (1957). Lasky does not, specifically, address the fraud on the court exception in and of itself. Moreover, respondent admits that multiple circuits maintain a fraud on the court exception despite Lasky. Response to Motion to Vacate at 25, para. 72, filed September 17, 2014. Therefore, Lasky is binding only as a prohibition on the exercise of equitable power by this Court for reasons other than fraud on the court.

Additionally, we disagree with respondent's reading of Harbold. Although the holding of Harbold at first appears to be ambiguous, stating that "[o]ther circuits have recognized an exception upon a showing of fraud on the court", the Harbold court would have no need to examine whether the elements of fraud on the court were present if the exception were not available. Harbold v. Commissioner, 51 F.3d at 622. Furthermore, the Sixth Circuit itself confirms this reading of Harbold in Backstrom v. Commissioner, 168 F.2d 489 (6th Cir. 1998) (unpublished opinion), citing Harbold for the proposition that "[o]nce a decision of the tax court becomes final, the court normally does not have jurisdiction to consider a motion to vacate its decision unless the taxpayers can demonstrate fraud on the court." Backstrom v. Commissioner, 168 F.3d at 489; see also Klein v. United States, 86 F. Supp. 2d 690, 697 (E.D. Mich. 1999) (analyzing the Tax Court's jurisdiction to vacate and maintaining that an exception for fraud on the court applies).

Therefore, this Court has jurisdiction to vacate its prior decision if fraud on the court can be established.

II. Pleadings

In his reply brief, respondent further contends that even if this Court has jurisdiction to vacate its decisions if we find fraud on the court, petitioner has failed to adequately plead fraud on the court in his submissions. We disagree.

In support of his contention, respondent cites case law from the Seventh Circuit and argues that petitioner failed to adequately plead fraud upon the court under the "heavy burden of * * * particularized pleading" requirement of Kenner v. Commissioner, 387 F.2d 689, 691 (7th Cir. 1968). Although Kenner, like Harbold, establishes a fraud on the court exception to this Court's general lack of jurisdiction to vacate its final decisions, Kenner's pleading requirements are not relevant to the case at bar. Kenner, which was decided under the law of the Seventh Circuit, concerns a different substantive standard of fraud on the court than the one at issue here. In Kenner, the court states that it is "necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision." Id. at 691. The requirement of an unconscionable plan is in contrast to the substantive law applicable in the Sixth Circuit, which is controlling here.

The Sixth Circuit Court of Appeals has a long line of cases examining the elements of a fraud on the court claim. General Medicine, P.C. v. Horizon/CMS Health Care Corp., 475 Fed. Appx. 65 (6th Cir. 2012) (unpublished opinion); Johnson v. Bell, 605 F.3d 333 (6th Cir. 2010); Carter v. Anderson, 585 F.3d 1007 (6th Cir. 2009); Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993). Demjanjuk, a case concerning prosecutorial misconduct in the deportation of an alleged Nazi war criminal,[7] and its progeny establish fraud on the court as conduct:

[7]The legal proceedings concerning Mr. Demjanjuk spanned well over three decades and several nations. At the time of the relevant decision, Mr. Demjanjuk had been denaturalized by the United States and deported to Israel, where he had been convicted of war crimes. Demjanjuk v. Petrovsky, 10 F.3d 338, 340 (6th Cir. 1993). The Israeli Supreme Court then overturned this conviction. Id. Following the prosecutorial misconduct lawsuit discussed here, Mr. Demjanjuk was again deported and convicted of war crimes in Germany, only to posthumously have his conviction reversed on procedural grounds, as he died before he could file an appeal.

1. On the part of an officer of the court;
2. That is directed to the "judicial machinery" itself;
3. That is intentionally false, wilfully blind to the truth, or in reckless disregard for the truth;
4. That is a positive averment or is concealment when one is under a duty to disclose;
5. That deceives the court.

Demjanjuk, 10 F.3d at 348. A party must prove all five elements by clear and convincing evidence in order to prevail in a motion vacate a decision for fraud on the court. Carter, 585 F.3d at 1011; General Medicine, P.C., 475 Fed. Appx. at 71; Fharmacy Records v. Nasser, 465 Fed. Appx. 448, 451 (6th Cir. 2012).

Thus, pursuant to Demjanjuk, a party does not need to meet the higher Kenner threshold of proving an "unconscionable plan or scheme" to establish that fraud on the court has been committed. Rather, "reckless disregard" and "willful blindness" are sufficient. The governing law of the Seventh Circuit as evidenced in Kenner, and the Sixth Circuit as established in Demjanjuk, differ substantively. Both Kenner's evidentiary and pleadings thresholds are more stringent than the ones controlling here. Therefore, the Kenner pleading requirements are not binding on the present matter. Instead, petitioner's complaint must allege sufficient facts to establish a fraud on the court claim pursuant to the Demjanjuk factors.

II. Elements of Fraud on the Court

Demjanjuk sets forth five factors that must be proven in order for a tribunal to vacate its prior decision on fraud on the court grounds. We consider each of these factors in turn.

1. Officer of the Court

The first of the Demjanjuk factors is that the fraudulent conduct must be perpetrated by an "officer of the court." An officer of the court is "[a] person who is charged with upholding the law and administering the judicial system". Black's

Law Dictionary (9th ed. 2009).[8] The Sixth Circuit treats every attorney as an officer of the court. Demjanjuk v. Commissioner, 10 F.3d at 352.[9] The Sixth

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[8]Black's Law Dictionary further defines an "officer" as "[a] person who holds an office of trust, authority, or command. In public affairs, the term refers esp. to a person holding public office under a national, state, or local government, and authorized by that government to exercise some specific function". Black's Law Dictionary (9th ed. 2009). This definition suggests that an individual, holding a specific position or serving a specific function, in whom the court must place its trust, by virtue of that position or function, may be an officer thereof.

[9]Additionally, individuals may be officers of the court if they are "agent[s] through whom the court acts." See Tangwall v. Jablonski, 111 Fed. Appx. 365 (6th 2004) (unpublished decision) ("The receiver is an officer of the court, an agent through whom the court acts."). This category includes marshals, court-appointed bankruptcy trustees, receivers, estate administrators, and auditors. King v. United States, 379 U.S. 329, 337 n.7 (1964) (trustee in bankruptcy is an officer of the court); Taylor v. Sternberg, 293 U.S. 470, 472 (1935) (bankruptcy receiver "is an officer of the court which appoints him."); State of Missouri ex rel. Burns Nat'l Bank of St. Joseph v. Duncan, 265 U.S. 17, 27 (1924) ("An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court; it is the possession of the court."); Collins v. Miller, 252 U.S. 364, 369 (1920) ("an extradition commissioner is an officer of the court which appoints him."); In re Peterson, 253 U.S. 300, 312 (1920) ("The auditor is an officer of the court which appoints him."); Lammon v. Feusier, 111 U.S. 17, 19 (1884) ("the marshal, as the officer of the court that issues the writ * * *"); United States v. Wagner, 382 F.3d 598, 607 (6th Cir. 2004) (citing 18 U.S.C. sec. 152(1), which proscribes punishment for a person who "knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor.").

Courts in the Sixth Circuit have also recognized experts assisting the court with technical or specialized tasks as "officers of the court". Ferron v. Search Cactus, L.L.C., No. 2:06-CV-327, 2008 WL 1902499, at *4 (S.D. Ohio, 2008) ("In certain situations, courts appoint computer forensic experts to act as officers of the court * * *"); Bardley v. Milliken, 426 F. Supp. 929, 939 (E.D. Mich. 1977) ("We, therefore, appointed three desegregation experts to 'serve as officers of this court

Circuit may also recognize individuals or governmental actors other than attorneys as officers of the court in certain circumstances. Buell v. Anderson, 48 Fed. Appx. 491, 499-500 (6th Cir. 2002) (unpublished opinion); Workman v. Bell, 227 F.3d 331 (6th Cir. 2000) (en banc); Demjanjuk, 10 F.3d at 352 ("When the party is the United States, acting through the Department of Justice, the distinction between client and attorney actions becomes meaningless. The Department acts only through its attorneys.").

Petitioner alleges that the missing documents would have been helpful to him in the prosecution of his case and that such documents were represented as having been destroyed by respondent. Motion to Vacate, paras. 5, 20, filed July 21, 2014. Petitioner further alleges, in his supporting brief of July 15, 2014, that respondent perpetrated this fraud through his attorney:

> The parties went through extensive discovery in this case and former counsel for Plaintiff specifically requested the documents contained in the newly discovered evidence. Counsel attorney * * *, among others, indicated that everything was destroyed, and failed to produce the evidence. Therefore, the logical inference is that either the Service committed a fraud or there is newly discovered evidence that was necessary to the Plaintiff in his original trial.

Brief in Support of Motion for Leave to File Out of Time Motion to Vacate at 6, filed July 15, 2014, Garavaglia v. Commissioner, T.C. Memo. 2011-228. Counsel for respondent argued that "there is no reason to think that records ever existed that would have exonerated petitioner". Reply Brief for Respondent at 352, filed March 3, 2011, Garavaglia v. Commissioner, T.C. Memo. 2011-228. It now appears that some documents which petitioner had been led to believe were destroyed were at all times in the possession of respondent. It remains to be

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and * * * assist in the study and evaluation of said desegregation plans and perform such other service as said experts deem advisable or as the court may from time to time direct.'"). Courts in other circuits generally follow the same practice and may appoint experts as officers of the court. E.g. Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp., 280 F.R.D. 681 (S.D. Fla. 2012) (computer expert as an officer of the court); Simon Prop. Grp. L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D. Ind. 2000) (computer expert as an officer of the court); Costello v. Wainwright, 387 F. Supp. 324, 327 (M.D. Fla. 1973) (medical experts as officers of the court).

established whether those documents will in fact mitigate petitioner's tax liability. It seems that the documents that respondent's counsel argued were missing are now in whole or in part available.

If respondent recklessly or intentionally concealed those documents, then the statement by respondent's counsel that the records never existed and were not missing fulfills this aspect of the factors constituting fraud on the court by an officer of the court. Therefore petitioner's allegation is sufficient to plead the first requirement.

2. Directed to the Judicial Machinery

The second factor requires that the fraudulent conduct is "directed to the 'judicial machinery' itself". Demjanjuk, 10 F.3d at 348. The Sixth Circuit cites 7 Moore's Federal Practice and Procedure, para. 60.33 in consideration of this factor, explaining that where fraud on the court exists "the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication". Demjanjuk v. Commissioner, 10 F.3d at 352. This element is thus satisfied if the fraud "'actually subvert[ed] the judicial process' by preventing the judicial machinery from performing in the usual manner to impartially adjudge the case presented." Followell v. Mills, 317 Fed. Appx. 501, 506 (6th Cir. 2009) (unpublished opinion) (alterations in original); see also Rodriguez v. Honigman Miller Schwartz & Cohn LLP, 465 Fed. Appx. 504 (6th Cir. 2012). Here, petitioner alleges that he was "unable to present an adequate defense at trial" as a result of respondent's conduct. Motion to Vacate para. 5, filed July 21, 2014. Demjanjuk itself concerned this very issue. See Demjanjuk v. Commissioner, 10 F.3d at 350. As such, petitioner's allegation sufficiently pleads the second requirement.

3. Conduct That Is Intentionally False, Wilfully Blind to the Truth, or in Reckless Disregard of the Truth

Although Demjanjuk provides three alternatives for meeting this third factor of a fraud on the court claim, the case itself is concerned with fraud on the court as a result of reckless disregard of the truth on the part of an officer of the court. In Demjanjuk, the plaintiff alleged that several attorneys at the Department of Justice perpetrated fraud on the court in withholding documents obtained from foreign governments from the plaintiff when these documents may have proven

'exculpatory in his deportation case. Although the special master appointed by the court did not find intentional or willful conduct on the part of the prosecutors, the court ultimately held that the attorneys had perpetrated fraud on the court by way of reckless disregard. Id. at 349, 356. In establishing the requirements of reckless disregard, the Demjanjuk court adopted the definition employed by the Restatement (Second) of Torts:

> Recklessness may consist of either of two different types of conduct * * * In [the second type], the actor has * * * knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.

Demjanjuk v. Commissioner, 10 F.3d at 349 (alterations in the original). In Demjanjuk, "[t]he OSI attorneys acted with reckless disregard for their duty to the court and their discovery obligations in failing to disclose at least three sets of documents in their possession before the proceedings against Demjanjuk ever reached trial." Id. at 350. Furthermore, in examining whether an alleged miscommunication between the individual prosecutors involved in the case relieved them of their obligation to the accused, the Demjanjuk court asserted that "the prosecution cannot escape its disclosure obligation by compartmentalizing information or failing to inform others in the office of relevant information." Id. at 353. This is the contention that is at issue here. Petitioner specifically alleges that respondent "perpetrated a fraud upon this Court because a reasonable search would have found th[e] allegedly destroyed evidence." Motion to Vacate, para. 12, filed July 21, 2014. This allegation, if true, implicates the Demjanjuk reckless disregard standard. Therefore the petitioner's pleading is sufficient for the third requirement.

4. Positive Averment or Concealment

The fourth of the Demjanjuk factors requires positive averment or concealment "when one is under a duty to disclose." Demjanuk v. Commissioner, 10 F.3d at 348. Petitioner alleges that respondent failed to produce documents that could have been produced as evidence at trial and that respondent claimed these documents had been destroyed. Motion to Vacate, paras. 5,9, 20, filed July 21, 2014. This allegation of nonproduction, if true, is sufficient to meet the concealment prong of the Demjanjuk test.

5. Conduct That Deceives the Court

The fifth factor in the Demjanjuk test necessitates that the conduct at issue actually deceives the court. Petitioner alleges that the documents believed to be destroyed could have been "used at trial to substantiate his defense" and that this was "the reason that Petitioner was unable to present an adequate defense at trial". Motion to Vacate, para. 5, 11, filed July 21, 2014. This allegation is sufficient to plead the fifth prong of the Demjanjuk test.

In conclusion, upon review of petitioner's Motion to Vacate, respondent's response, petitioner's reply, and the record of this case, it is hereby

ORDERED that the Court deems that an evidentiary hearing is necessary for the purpose of determining whether respondent has perpetrated fraud on the court. Therefore this case is calendared for an evidentiary hearing at a Special Session of the Court commencing at **9:00 a.m. on October 14, 2014**, in Room 1031, Levin U.S. Courthouse, 231 W. LaFayette Boulevard, Detroit, Michigan, 48226. It is further

ORDERED that each party shall prepare a written memorandum and submit it directly to the undersigned and to the opposing party by **October 7, 2014, at 12:00 p.m.** The memorandum shall set forth the estimated amount of time each party needs to present their case and identify the party's witnesses, with a brief summary of the anticipated testimony of such witness. Witnesses who are not

identified will not be permitted to testify at the hearing without leave of the Court upon sufficient showing of cause.

This Order constitutes official notice of the same to the parties herein.

(Signed) David Laro
Judge

Dated: Washington, D.C.
September 29, 2014